No. 16255

United States
COURT OF APPEALS
for the Ninth Circuit

CARL E. THORSON,

Appellant,

vs.

INLAND NAVIGATION COMPANY,
a Corporation,

Appellee,

vs.

ARCHER-DANIELS-MIDLAND CO.,
Third Party Appellee.

IN ADMIRALTY

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 12-58

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JURISDICTION OF THE COURT

The within cause comes within the admiralty and maritime jurisdiction conferred upon the United States by the United States Constitution, Article III, Section 2.

STATEMENT OF CASE

This is a suit in admiralty brought by libelant, Carl E. Thorson, a longshoreman who was injured in the

course of his employment while engaged in discharging bulk grain from the hold of a large barge operated by respondent, Inland Navigation Company, a corporation.

The respondent was and is a common carrier, engaged in interstate commerce on the Columbia River, transporting petroleum products into the interior and transporting grain from the interior to tidewater.

In the furtherance of its enterprise respondent uses tug boats and barges. The barges have two decks, petroleum being carried in the lower hold on the upstream trip and the upper deck being used for bulk grain cargo on its return.

The barge on which libelant was injured was lying in the navigable waters of the Columbia River at the Port of Vancouver, Washington, and its cargo of bulk grain was being discharged by means of a suction device comprising a suction fan and flexible tubes, said tubes extending into the holds of the barge, it being the duty of the longshoremen to control the mouth or open end of the tubes where grain is picked up by suction and carried to the storage bins of the grain elevators.

The barge involved in this case was numbered 501 and has several hatches. When grain was discharged from one, the suction tubes would be mechanically hoisted and swung by hand lines to another hold as the work progressed.

The barge being used for transporting petroleum, it was required by law to carry a red flag, commonly known as a Baker flag. The flag consisted of sheet metal

one-eighth of an inch thick, sixteen inches wide at the stem end, tapering to twelve inches, and is twenty-four inches long, and weighs about twenty-five pounds, the flag welded to a stem consisting of a one-and-one-fourth inch iron pipe, said stem was about a foot long. The flag was mounted at the bow of the barge by slipping the stem of the flag into the top end of a larger pipe, which larger pipe was welded to the deck.

The Baker flag on this barge was therefore free to be lifted out and free to swing on its pivot. The Baker flag assembly was positioned above and about eight feet from No. 1 Hatch.

At the time of the accident libelant was in No. 1 Hatch. The Baker flag became dislodged and fell into the hatch, striking him on the head and shoulders, causing him to suffer injuries.

No one saw the flag become detached and it was not seen until it came flying through the hatch to strike libelant.

At the time of the accident there was a ship lying alongside, its hawsers extending over the barge.

Some of the respondent's barges had the Baker flag rigged differently—some had longer flag stems to slip into its receptacle, some are fastened rigidly and some have the stem fastened by means of a set screw.

The libelant charges the vessel was unseaworthy in that said signal flag was not properly secured to the vessel, but was loose in its socket and positioned where it was wont to fall into the hold of said vessel, and that libelant suffered injuries by reason thereof.

The foregoing statement of facts is based upon the Transcript of Testimony, pages 10 to 20 inclusive, and upon Exhibits Nos. 21, 22, 23 and 24, said exhibits identified and received in evidence by stipulation (Tr. 5).

THE ISSUE TO BE DETERMINED ON APPEAL

Was the barge No. 501 unseaworthy in that the Baker flag was not properly secured to the vessel but was loose in its socket and positioned where it was wont to fall into the hold of said vessel, and was such unseaworthiness the proximate cause of the accident and the injuries suffered by libelant?

ARGUMENT

Since *The Osceola* case, 47 L. Ed. 760, it is a settled rule of law that the vessel and her owner are liable to indemnify a seaman for injuries caused by the unseaworthiness of the vessel, its appliances and gear.

It is equally well settled that a longshoreman, engaged in discharging cargo from a vessel in navigable waters, is a seaman. *Seas Shipping Co. v. Sieraki,* 328 U.S. 88, 90 L. Ed. 1099; *Pope & Talbot v. Hawn,* 346 N.W. 406, 98 L. Ed. 143.

There is no conflict in the evidence in the case at bar. Respondent does not dispute the fact that the Baker flag was not secured other than by slipping its foot-long stem into a vertical pipe of larger diameter. There is no conflict in the evidence that other barges used by re-

spondent in the same service had fixed stems (Tr. 14-15), and that some Baker flags were secured by means of a set screw (Tr. 20).

Respondent contends that the Baker flag, while required by law as a warning that the barge was carrying petroleum, was also used as a wind indicator and had to swing freely. However, it would seem a small excuse, since a twenty-five pound flag with its stem slipped into another pipe would seem a mechanical monstrosity as a wind indicator, and in any event, there is no reason why even a wind indicator appliance may not be unseaworthy.

In determining whether a vessel's appliances are seaworthy one must be mindful of the conditions which the vessel would normally meet. Here we have a barge—a vessel riding low in the water, regularly moored where ships whose decks are comparatively high, with hawsers extending over the barge (Tr. 12). The tightening up of the hawsers might well dislodge any appliance of the barge which is not properly secured. Further, the device used for unloading, having hand lines in its operation, may get caught by the wind and be blown around to dislodge any appliance not properly secured. Any of these dangers could be easily recognized by the owner, and in fact, the owner met the problem by securing the Baker flag on other barges by using a fixed stem or in securing the same by use of set screws.

A seaman engaged in work in a hold below such an unsecured appliance, does not have a reasonably safe place in which to work.

A recent case in point is *Wiel and Amundsen, A/S. as Claimants of the S. S. Romulus, Appellant, v. Roy E. Potter, Appellee,* 228 F.2d 341:

> "The action was brought by a longshoreman, who, while loading lumber in forehold of ship, fell onto deck beneath when a removable rod, constituting a part of fencing railing above deck just forward of opened forehold, gave away in his hands as he moved to his right from lumber on left side of ship, evidence would sustain findings (1) that longshoreman had not been negligent in proceeding on narrow part of foredeck protruding over hold and relying on loose rod to sustain him instead of moving over lumber itself or climbing over fencing and proceeding over foredeck, and (2) that shipowner had been negligent and its ship unseaworthy because top rail had been loose and not fixed permanently or secured and because there had been no cotter pin inserted in slot in rod to make it fast to railing."

In *Yarbrough v. American Mail Line,* 119 F. Supp. 776, a seaman was injured when a defective heel block became loose, was lowered precipitately and hit the libelant on the head. A finding that the vessel was unseaworthy was made as a matter of course. The Court said:

> "The accident having been caused by faulty equipment under control of respondent shipowner, there is liability for consequential injury whether we call it unseaworthiness or failure to furnish a safe place to work."

In *Williams v. Lykes Bros. S. S. Co.,* 132 F. Supp. 732, a heavy supporting stanchion, without apparent cause, fell over and struck a longshoreman who was working in the hold of a vessel. Vessel was unseaworthy

and her owner was liable for damages. The Court said:

> "The evidence does not offer an explanation as to why the stanchion fell, except the inference that it was improperly placed."

Likewise, in the case at bar, the evidence does not offer any explanation why the flag fell. Whether the wind blew it out, a hawser tightened to dislodge it, or other lines caught by the wind was the cause, is not known. Suffice to say the flag was not properly secured to meet conditions which it was bound to meet in the normal course of the service to which it was put.

In *Johnson v. United States,* 333 U.S. 46, 56, 92 L. Ed. 468, a seaman engaged in taking slack out of a rope attached to a cargo boom, one end of which was held by another seaman on an upper deck, was, while bending over to coil away the rope which he had drawn through the blocks, struck by a block which from some unexplained cause fell from the hands of a co-worker.

The Court invoked the rule of res ipsa loquitur and said:

> "No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked. The rule deals only with permissible inferences from unexplained events. In this case the District Court found negligence from Dudder's act of dropping the block since all that petitioner was doing at the time was coiling the rope. The Circuit Court of Appeals reversed, 160 F. 2nd 789, feeling that petitioner might have pulled the block out of Dudder's hands. It reasoned that although petitioner testified he was bending over coiling the rope when the block hit him, the concussion may have caused a lapse of memory which antedated the actual in-

jury. The inquiry, however, is not as to possible causes of the accident but whether a showing that petitioner was without fault and was injured by the dropping of the block is the basis of a fair inference that the man who dropped the block was negligent. We think it is, for human experience tells us that careful men do not customarily do such an act."

The Court below, in its memorandum opinion (Tr. Rec. Vol. 1, page 19), and in its finding of fact (Tr. Rec. Vol. 1, page 21), said:

"The evidence reveals that lines and gear of the stevedore hung freely in the area, these lines and unloading gear were not part of the barge's gear."

The Court below was apparently unmindful of the rule in *Peterson v. Alaska S. S. Co.*, 205 F.2d 478, affirmed, 347 U.S. 396, 98 L. Ed. 798.

In this case a longshoreman was injured by faulty gear which was assumed to belong and brought aboard by the stevedoring company.

The Court held:

"A shipowner is liable for injuries suffered on his ship by a stevedore and resulting from unseaworthiness of equipment, even though the equipment is not shown to belong to the shipowner or to be part of the ship's equipment, but is assumed to belong to the stevedore's independent employer, as a part of that employer's loading equipment, brought on board by such employer."

In this case the Court said:

"If the block was being put to proper use, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy.

> "In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, here we are dealing with a specie of strict liability regardless of fault."

We submit that an unsecured Baker flag on a barge used in the service where hawsers and hanging lines are apt to dislodge it where it would fall into the hold, is not a seaworthy device, and a longshoreman required to labor within striking distance is not provided a reasonably safe place to work.

Respectfully submitted,

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By.....
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